

Nick Smith

Justice Through Apologies: Remorse, Reform and Punishment, (Cambridge: Cambridge University Press, 2014), 402 pages. ISBN 978-0-521-18945-3 (pbk.). Hardback/Paperback: £62.00/15.00.

Smith's book is not a work of moral philosophy. Instead, it applies a moral theory of apologies to the legal realm. Much of the book is practical in character as it describes concerns regarding, and recommendations for, the legal use of apologies. However, there is a large-scale theoretical underpinning to this work of applied philosophy. For Smith, the apology is a richly textured ethical practice with independent value. However, legal usage involves translating apologies into other currencies: criminal cases deal in the metric of punishment, civil law is measured by dollars. Those translations create difficulties, both practical and theoretical.

The text is structured by three substantive discussions. These are (1) an argument against court-ordered apologies, (2) an argument in favour of using apologies to mitigate criminal punishment, and (3) an assessment of apologies in civil cases. This review will describe those arguments in brief.

However, before we begin that review, we need to start, as Smith does, with an overview of apologetic ontology. Smith represents *Justice Through Apologies* as the second part of a conversation begun in *I Was Wrong: The Meaning of Apologies* (2008). In the previous book, Smith advanced a rich account of the apology's existence conditions, which, in brief, requires the offender to recount the details of the injury, accept blame, refrain from future offending and, where appropriate, provide recompense (p. 20). This account of the apology has both backwards and forwards-looking elements. It is both practical and dispositional, and requires particular forms of apologetic agency. It is, as Smith recognizes, a very demanding account: he calls it the 'categorical' apology. Smith's new book, *Justice Through Apologies* applies that demanding concept to the American legal system.

Smith's first major discussion offers a persuasive critique of court-ordered apologies. The text canvasses a number of arguments, both in favour and in opposition, to the practice. One of the more interesting arguments observes that a court-ordered apology changes the incentive structure for defendants. Individuals who are ordered to apologise will face further punishment if they do not comply. Therefore, innocent persons will have reason to apologise when doing so will mitigate their sentences. Criminal justice systems are often engaged with vulnerable individuals, and we have good reason to believe that many of those individuals are treated unfairly by the legal system. Many innocents

are convicted of crimes they did not commit and to make them apologise simply adds further punishment.

For Smith, the central argument against court-ordered apologies is that such an order is in tension with the nature of the apologetic performance itself (pp. 69–70, 74). A coerced apology is unlikely to have much, if any, normative worth, because the apology is not (only) a speech act. For Smith, a true (categorical) apology represents the offender's acceptance of blame and commitment to moral reform (p. 61). Personal acceptance and future commitment cannot be ordered by a court. Threats of greater punishment, however, can induce a recalcitrant offender to pretend to apologise, and a pretended apology constitutes a failure.

I agree with Smith that forced apologies are suspect. But, I do not follow his analysis. Smith's position that an apology cannot be understood as a discrete speech act is contentious. Smith believes that the apology has dispositional, and indeed, practical components that cannot be captured in a text or utterance. For example, Smith tends to reject apologies wherein the offender does not have an appropriate mental state (of guilt or self-blame). But it seems equally plausible to think that an apology is just a speech act and the presence or absence of dispositions in the issuers of the apology is irrelevant to the question of whether an apology has indeed occurred.

To continue, dispositional facts may, however, be relevant to the *quality* of the apology and here, my theoretical disagreement with Smith ends with a practical concurrence. For it is plausible to think that courts should aim to order good, as opposed to bad, apologies, and that a court order to apologise is not likely to produce good apologies and, finally, that courts are not well-positioned to judge apologetic quality. Therefore, I agree with Smith that courts should, in general, avoid sentencing offenders to apologise—although we are well-advised to endorse some judicial discretion in this area.

A court-ordered apology adds to the costs of criminality, but voluntary apologies can also help offenders avoid or reduce criminal penalties. The book's second area of discussion is an argument in favour of using apologies to mitigate criminal punishment. Smith offers a nuanced defence of a practice that treats voluntary apologies as reasons to reduce the severity of otherwise applicable penalties. Smith recognizes the difficulty of the position he aims to occupy. Because his account of the apology's existence conditions is so demanding, and courts are not good at assessing the necessary conditions, it will be difficult for courts to know when an apology is being offered. Moreover, 'vicious' criminal offenders will have strong incentives to *seem* to offer an apology, if they could thereby expect a reduction in sentencing (p. 101).